

**A Abdul Ghani bin Abdullah v Eon Bank Bhd (HHB Holdings
Bhd, third party)**

B HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS
NO D8-24-188 OF 2008
MARY LIM J
20 DECEMBER 2010

C *Contract — Letter of undertaking — Undertaking by bank to refund redemption
sum if transfer of shares could not be registered for any reason whatsoever — Payer
of redemption sum of view transfer of shares incapable of being registered —
Registration not attempted — Refund of redemption sum demanded — Whether
bank right to accede to demand — Interpretation of undertaking — Intention of
D parties — Whether plaintiff was induced by misrepresentation of third party to
execute deed of settlement*

E The plaintiff filed an originating summons against the defendant for a
declaration that his indebtedness to the defendant on an overdraft account had
ceased on 21 February 2002. As the facts of the case were substantially disputed
the originating summons was converted to a writ action. The defendant
disputed the claim and counterclaimed for RM671,531.78, with accruing
interest thereon, as the balance due from the plaintiff after having credited his
overdraft account with the proceeds of the sale of certain shares ('the shares')
F which was one of the collateral the plaintiff had pledged to the defendants to
secure the overdraft. The plaintiff disputed the counterclaim and added a third
party to the proceedings claiming indemnity against it if the plaintiff was found
liable to the defendant. Prior to the proceedings being filed, the plaintiff had
attempted to settle his overdraft with the defendant by agreeing to sell the
G shares to the third party for RM12.8m. Pursuant to the agreement the third
party fully paid the redemption sum of RM12.1m due to the defendant on 21
February 2002. However, before the agreement could be completed the third
party was informed by the party that initially sold the shares to the plaintiff that
the plaintiff could not legally sell the shares to the third party as that party had
H the sole option on the shares pursuant to its agreement with the plaintiff. When
the third party's request to the plaintiff to resolve the problem within a week
went unheeded, the third party terminated its share purchase agreement with
the plaintiff and called on the defendant to refund the redemption sum as it was
of the view the shares were incapable of being registered in its name. Despite
I the plaintiff's objection to the move the defendant refunded the sum to the
third party and debited the plaintiff's account. The plaintiff took the stand that
the refund was wrongful and that his account had been fully settled when the
defendant accepted the redemption sum. The defendant then foreclosed on the
shares which eventually resulted in the third party again becoming the

purchaser thereof. On this occasion the sale went through and the sale price was credited into the plaintiff's overdraft account leaving RM671,531.78 still owing. During the process of the foreclosure sale the plaintiff sued the third party for wrongful termination of their initial share sale agreement. The parties negotiated and settled the matter out of court with the plaintiff signing a deed of settlement and a letter of consent. Vis-à-vis the defendant, the plaintiff maintained he signed the deed of settlement and letter of consent on the assumption that the defendant had agreed to a full discharge of his liability under the overdraft account. He claimed he relied or acted upon the defendant's express representation, conduct or promise that he had been fully discharged from all liability. Vis-à-vis the third party, the plaintiff alleged he had signed the deed of settlement based on certain misrepresentations the third party had made.

Held, dismissing the claims against the defendant and the third party with costs and allowing the counterclaim:

- (1) The reading and construction of the defendant's undertaking had to be of the entire undertaking and not merely of any choice terms or words in it, like 'registration' or 'transfer', without regard to the factual matrix. Otherwise, the intention of HHB and the defendant in respect of the undertaking could not be gathered and the pledge, promise or guarantee which the parties had agreed to undertake could not be given effect to (see para 24).
- (2) Limiting the construction and interpretation of the undertaking to a trigger event of the actual 'registration' of the shares as opposed to the 'registration of the transfer' of the shares rendered the word 'transfer' in the undertaking redundant, inoperative or surplus. Such a construction should be avoided as all parts of the undertaking should be given effect to without rendering any part inoperative or surplus (see para 24).
- (3) As the parties to the undertaking were the defendant and HHB it was their intention that was relevant and not what the plaintiff said or thought the undertaking meant (see para 21).
- (4) The circumstances and content of the undertaking showed it was the intention of HHB and the defendant that the defendant was required to see if the transfer of the shares to HHB was not registered for any reason whatsoever. To do that the defendant had to exercise some examination of the call by HHB before performing or acting on HHB's demand for refund (see para 22).
- (5) The defendant was not required to enquire into or examine the rightness of that call, just whether the four corners of that call had been met. It was

- A not expected to sit as arbiter. So long as HHB provided the defendant with a reason that the transfer of the shares could not be registered, that was enough (see para 22).
- B (6) The plaintiff's own conduct showed he had not relied on any representation by HHB when he entered into the deed of settlement. This reliance was vital for any misrepresentation to be actionable as there had to be an inducement by HHB to the plaintiff's detriment and an alteration in the plaintiff's position (see para 64).
- C (7) The plaintiff never accepted any matter that was brought to his attention without proper inquiry. He and his solicitor took every available step to verify everything that was told to them. The plaintiff was often cautious and particular in how he wanted the contents of any document to be worded or framed (see para 64).
- D (8) The plaintiff relied on his own interpretation of the state of affairs between him and the defendant regardless of what others said and displayed conduct quite independent of any representation from anyone (see para 65).
- E (9) Neither HHB nor its solicitors were in a position to make any representations for the defendant as neither was cloaked with authority or agency responsibilities. TPW2 (HHB's solicitor) was not the agent of the defendant whether expressly or by inference. There was no ratification by the defendant of any of TPW2's actions. In fact no causal link or relationship between the defendant and HHB existed for the exercise of
- F ratification to operate (see paras 60 & 61).

[Bahasa Malaysia summary]

- G Plaintiff telah memfailkan saman pemula terhadap defendan untuk deklarasi bahawa keberhutangannya kepada defendan atas akaun overdraf telah tamat pada 21 Februari 2002. Oleh kerana fakta kes dipertikaikan saman pemula itu telah ditukar kepada writ tindakan. Defendan telah mempertikaikan tuntutan dan tuntutan balas berjumlah RM671,531.78, dengan faedah terakru, kerana baki yang perlu dibayar daripada plaintiff setelah mengkreditkan akaun overdrafnya dengan hasil jualan saham tertentu ('saham') yang merupakan
- H salah satu daripada kolateral yang plaintiff telah jadikan sandaran kepada defendan-defendan untuk menjamin overdraf. Plaintiff telah mempertikaikan tuntutan balas dan menambah pihak ketiga kepada prosiding menuntut indemniti terhadapnya jika plaintiff didapati bertanggungjawab kepada defendan. Sebelum prosiding difailkan, plaintiff telah cuba menyelesaikan
- I overdrafnya dengan defendan melalui persetujuan menjual saham-saham sejumlah RM12.8 juta kepada pihak ketiga. Menurut perjanjian pihak ketiga telah membuat bayaran penuh jumlah penebusan berjumlah RM12.1 juta yang perlu dibayar kepada defendan pada 21 Februari 2002. Walau bagaimanapun, sebelum perjanjian itu dapat diselesaikan pihak ketiga

diberitahu oleh pihak yang pada mulanya telah menjual saham-saham itu kepada plaintif bahawa plaintif tidak boleh menjual secara sah saham-saham itu kepada pihak ketiga kerana pihak tersebut mempunyai pilihan mutlak ke atas saham-saham itu menurut perjanjiannya dengan plaintif. Apabila permintaan pihak itu kepada plaintif untuk menyelesaikan masalah itu dalam tempoh seminggu tidak dihiraukan, pihak ketiga telah menamatkan perjanjian sahamnya dengan plaintif dan meminta defendan membayar balik jumlah penebusan kerana ia berpendapat saham-saham itu tidak dapat didaftarkan atas namanya. Meskipun plaintif membantah terhadap tindakan ini defendan telah membayar baik jumlah itu kepada pihak ketiga dan mendebitkan ke akaun plaintif. Plaintif berpendirian bahawa bayaran balik itu salah dan akaunnya telah diselesaikan sepenuhnya apabila defendan menerima jumlah penebusan itu. Defendan kemudian telah rampas saham-saham itu yang akhirnya menyebabkan pihak ketiga sekali lagi menjadi pembelinya. Dalam keadaan ini jualan itu berjaya dan harga jualan itu dikreditkan ke dalam akaun overdraf plaintif meninggalkan RM71,531.78 yang masih terhutang. Semasa proses jualan rampasan itu plaintif telah menyaman pihak ketiga kerana penamatan secara salah untuk perjanjian awal jualan saham mereka. Pihak-pihak telah berunding dan menyelesaikan perkara itu di luar mahkamah di mana plaintif telah menandatangani surat ikatan penyelesaian dan surat persetujuan. Melalui defendan, plaintif telah menegaskan yang dia telah menandatangani surat ikatan penyelesaian dan surat persetujuan itu atas anggapan bahawa defendan telah bersetuju melepaskan sepenuhnya liabilitinya di bawah akaun overdraf itu. Dia mendakwa yang dia bergantung atau bertindak atas representasi, perlakuan atau janji nyata defendan bahawa dia telah dilepaskan sepenuhnya daripada semua liabiliti.

Diputuskan, menolak tuntutan-tuntutan terhadap defendan dan pihak ketiga dengan kos dan membenarkan tuntutan balas:

- (1) Pembacaan dan pentafsiran akujanji defendan hendaklah keseluruhan akujanji dan bukan hanya mana-mana pilihan terma atau perkataan dalamnya seperti 'registration' atau transfer' tanpa mengambil kira matriks faktual. Sebaliknya, niat HHB dan defendan berkaitan akujanji itu tidak boleh dikumpul dan sandaran, janji atau gerenti yang pihak-pihak telah bersetuju untuk ambil tidak boleh dilaksanakan (lihat perenggan 24).
- (2) Dengan menghadkan pentafsiran akujanji kepada pemulaan kejadian 'registration' sebenar saham-saham berbanding dengan 'registration of transfer' saham-saham menyebabkan perkataan 'transfer' dalam akujanji itu tidak perlu, tidak operatif atau berlebihan. Pentafsiran sebegini patut dielakkan kerana semua bahagian akujanji patut dapat dilaksanakan tanpa menyebabkan bahagian lain tidak operatif atau berlebihan (lihat perenggan 24).

- A (3) Oleh kerana pihak-pihak kepada akujanji itu adalah defendan dan HHB maka niat mereka adalah relevan dan bukan apa yang dikatakan atau difikirkan plaintif tentang maksud akujanji itu (lihat perenggan 21).
- B (4) Keadaan dan kandungan akujanji itu membuktikan ia niat HHB dan defendan agar defendan dikehendaki melihat jika pemindahan saham-saham kepada HHB tidak didaftarkan untuk apa-apa sebab sekalipun. Untuk berbuat demikian defendan perlu melakukan beberapa pemeriksaan panggilan oleh HHB sebelum melaksanakan atau bertindak atas arahan HHB untuk membayar balik (lihat perenggan 22).
- C (5) Defendan tidak perlu menyiasat kewajaran panggilan itu, hanya sama ada semua syarat panggilan itu telah dipenuhi. Ia tidak perlu bertindak sebagai pemutus. Adalah memadai jika HHB dapat memberikan sebab kepada defendan bahawa pemindahan saham-saham itu tidak boleh didaftarkan (lihat perenggan 22).
- D (6) Perlakuan plaintif sendiri menunjukkan dia tidak bergantung kepada mana-mana representasi oleh HHB apabila dia memasuki surat ikatan penyelesaian. Kebergantungan ini adalah penting untuk apa-apa salah tanggapan diambil tindakan kerana perlu ada dorongan oleh HHB terhadap kerugian HHB dan perubahan dalam kedudukan plaintif (lihat perenggan 64).
- E (7) Plaintif tidak menerima apa-apa perkara yang dibawa kepada perhatiannya tanpa siasatan sewajarnya. Dia dan peguamcaranya telah mengambil setiap langkah sedia ada untuk mengesahkan segala yang diberitahu kepada mereka. Plaintif agak berhati-hati dan teliti tentang bagaimana dia inginkan kandungan apa-apa dokumen diolah atau dibentuk (lihat perenggan 64).
- F (8) Plaintif menggunakan pentafsirannya sendiri tentang keadaan antara dia dan defendan tanpa menghiraukan apa yang dikatakan oleh yang lain dan menunjukkan kelakuan yang berbeza daripada mana-mana representasi (lihat perenggan 65).
- G (9) HHB dan peguamcaranya bukan dalam kedudukan untuk membuat apa-apa representasi bagi pihak defendan kerana kedua-duanya tidak mempunyai kuasa atau tanggungjawab agensi. TPW2 (peguamcara HHB) bukan ejen defendan sama ada secara nyata atau melalui inferens. Tiada ratifikasi oleh defendan tentang tindakan-tindakan TPW2. Bahkan tiada kaitan sebab dan akibat atau hubungan antara defendan dan HHB yang wujud untuk pelaksanaan ratifikasi beroperasi (lihat perenggan 59 & 61).]
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Notes

For cases on letter of undertaking in general, see 3(2) Mallal's Digest (4 th Ed, 2010 Reissue) paras 4439–4440.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2006] 5 MLJ 1; [2006] 3 CLJ 1, FC (refd)

Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng [2001] 1 MLJ 241; [2001] 2 CLJ 133, FC (refd)

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45; [1997] 1 CLJ 497, FC (refd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd; [2007] 2 MLJ 301, FC (refd)

City Investments Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 MLJ 285, FC (refd)

Davey v Garrett (1877-78) 7 Ch D 473, HL (refd)

Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd [1995] 1 MLJ 149; [1995] 1 CLJ 283, SC (refd)

Hedley Byrne & Co Ltd v Heller & Partners [1964] AC 465, HL (refd)

Kheng Chwee Lian v Wong Tak Thong [1983] 2 MLJ 320, FC (refd)

Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors [1990] 3 MLJ 361, SC (refd)

Lee Kim Luang v Lee Shiah Yee [1988] 1 MLJ 193 (refd)

Merit Properties Sdn Bhd v Aktif Lifestyle Stores Sdn Bhd (formerly known as Yabohan Sdn Bhd) & Anor [2007] 5 MLJ 28; [2007] 4 CLJ 128, CA (refd)

Michael C Solle v United Malayan Banking Corporation [1986] 1 MLJ 45, FC (refd)

Min Hong Auto Supply Pte Ltd v Loh Chun Seng & Anor [1993] 3 SLR 498, HC (refd)

Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and Others [2007] 1 SLR 196 (refd)

Saminathan v Pappa [1981] 1 MLJ 121, PC (refd)

Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim [2003] 3 MLJ 460; [2003] 4 AMR 460, CA (refd)

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)

Wishing Star Ltd v Jurong Town Corporation No 2 [2005] 1 SLR 339 (refd)

Legislation referred to

Contracts Act 1950 ss 17, 18, 19

Rules of the High Court 1980 O 28 r 12

Dominic Puthuchearry (R Shanti with him) (Ghani & Co) for the plaintiff.

John Wong (HL Chan with him) (Azim, Tunku Farik & Wong) for the defendant.

R Abraham (Jeremy Lee with him) (Shook Lin & Bok) for the third party.

Mary Lim J:

[1] The plaintiff filed an originating summons seeking certain declaratory

- A orders against the defendant. This originating summons was directed to be converted into a writ pursuant to O 28 r 12 of the Rules of the High Court 1980 when it was subsequently found that there were substantial dispute as to the facts. This is a chronology of the critical events which either form the basis of or led to the present claim of the plaintiff, counterclaim of the defendant,
- B and the third party proceedings. These matters must be set out so that these competing claims can be properly appreciated.

CHRONOLOGY OF EVENTS

C *The first agreement*

- D [2] On 18 November 1999, the plaintiff entered into an agreement with Cheng Poh Holdings Bhd (Cheng Poh) to purchase 300,000 ordinary shares of Kuala Lumpur Mutual Fund Bhd ('KLMFB') for RM15m. The plaintiff called this the 'first agreement'. These 300,000 shares ('said shares') represented 5% of the fully-paid equity of KLMFB. The purchase price of RM12m was to be settled by way of a bankers' guarantee issued in favour of Cheng Poh with the balance to be paid within 36 calendar months from the date of the agreement.
- E Pursuant to the plaintiff's request, the defendant approve the issuance of a bank guarantee on 1 November 1999. In essence, it guaranteed the plaintiff's acquisition of the said shares at the purchase price of RM50 per share totaling RM15 m.

- F [3] Shortly after, on 5 November 1999, there was a variation of the terms of the guarantee facility following the plaintiffs request. The facility was then formalised vide guarantee facility agreement dated 3 March 2000. The said shares and two properties belonging to the plaintiff were offered as security for the facility. On 24 April 2000, the bank guarantee was issued. Then, on 22
- G March 2001, the plaintiff sought the defendant's consent to replace the two properties with another as he wanted to sell the two properties. The defendant agreed and the necessary documentation was duly executed. The final security for the guarantee facility comprised a memorandum of deposit and mortgage, guarantee facility agreement, charge over the plaintiff's property in Taman Tun
- H Dr Ismail and a letter of indemnity. This facility was subsequently restructured into an overdraft facility and a supplemental agreement dated 3 January 2002 was executed. However, the plaintiff defaulted on the repayments and letters of demand were issued by the defendant's solicitors.

I *The first SSA/second agreement*

- [4] Towards settling his debt with the defendant, the plaintiff agreed to sell the said shares to HHB Holdings Bhd ('HHB') for RM12,801,000. The parties then entered into a share sale agreement dated 21 February 2002. This

agreement is referred to as the first SSA by HHB but called the 'second agreement' by the plaintiff. Since this effort was to settle his debt with the defendant, the plaintiff asked for a redemption statement. The defendant provided one on 20 February 2002 where the redemption sum as at 21 February 2002 was stipulated to be RM12,087,353.26. Under the first SSA/second agreement, the payment for the said shares was to be in two tranches. The first tranche was a direct payment of RM12,087,353.26 to the defendant so that the said shares could be redeemed. The second tranche would be the payment of the balance sum to the plaintiff. The sale of the said shares was subject to the defendant providing an undertaking in the terms required by HHB, that is, that the defendant '... irrevocably undertake to refund to you in full the said redemption sum in the event the transfer of the shares to you is not registered for any reason whatsoever...'. The defendant provided the undertaking vide letter dated 20 February 2002.

[5] On 21 February 2002, HHB paid the redemption sum to the defendant. The defendant subsequently credited that sum into the plaintiff's overdraft facility account, and released the certificates and duly executed transfer forms for the said shares to HHB's solicitors. By letter dated 25 February 2002, the plaintiff requested for the return of the document of title to the Taman Tun property so that he could register a discharge of the charge. On 1 March 2002, the defendant returned the documents requested; namely the original title, duplicate charge and a certified true copy of the defendant's vesting order. On 11 March 2002, the defendant also delivered an executed discharge of charge to the plaintiff for his further action. Pausing here for a moment, it is noted that at this point in time, the first SSA/second agreement was not completed as it was awaiting approval from the Securities Commission and the Foreign Investment Committee.

[6] By notice dated 6 March 2002, Cheng Poh notified HHB that pursuant to the agreement between Cheng Poh and the plaintiff dated 18 November 1999, the plaintiff '... cannot legally sell his 5% stake in Kuala Lumpur Mutual Fund to HHB Holdings Bhd. The reason for this is as stated in cl 3 of the said agreement. 3. Clause 3 clearly shows that Cheng Poh Holdings Sdn Bhd has sole option on the said stake'. Upon receiving this notice, HHB wrote to the plaintiff on 12 March 2002 pointing out that the parties had agreed to sell and purchase the said shares 'free from all claims or charges or liens or any other encumbrances whatsoever thereto'. HHB then asked the plaintiff to resolve Cheng Poh's claim within seven days; failing which it would terminate the first SSA/second agreement.

[7] On 22 March 2002, HHB informed the defendant that it had terminated the first SSA/second agreement 'due to breach of a condition of the 1st SSA/Second Agreement'. In view of the fact that the transfer of the sale

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- A shares are now incapable of being registered in our client's name', HHB demanded that the defendant refund the redemption sum by 3.30pm of 22 March 2002. HHB's letter to the defendant was copied to the plaintiff who promptly disputed the breach by a letter sent out the same day to the defendant. In that letter, the plaintiff drew the defendant's attention to the fact
- B that under the terms of the undertaking, the defendant was 'only obliged to refund in the event the transfer of the shares is not registered for any reason whatsoever. The event has yet to occur and in the circumstances this demand on you is not only wrongful but is premature'. The plaintiff then asked the defendant not to accede to HHB's demand. The plaintiff also put the
- C defendant on 'notice that in the event you do make the payment, that you do so at your own peril and risk'. Despite that request, the defendant, on 26 March 2002, refunded the redemption sum to HHB after informing the plaintiff that it 'had no option whatsoever but to refund'. The defendant then proceeded to debit the plaintiff's account. Consequently, HHB returned the shares together
- D with other related documents to the defendant. On 2 April 2002, the defendant requested the plaintiff to return the original title and duplicate charge with the defendant's security interest intact. The plaintiff refused.
- E [8] By letter dated 9 May 2002, the defendant informed the plaintiff that his overdraft account was in excess and required the plaintiff to settle the excess 'immediately to avoid penalty charges on the settlement'. The overdraft facility remained unsettled and so by letter dated 21 June 2002, the defendant's solicitors demanded for the payment of the outstanding sum of
- F RM12,251,990.47 from the plaintiff. In response, the plaintiff wrote a letter dated 24 June 2002 where he 'inter alia' said: 'In so far as I am concerned, the loan in question had been repaid by virtue of the receipt by your client of the sum in question from HHB Holdings Berhad. Any subsequent return of the money by your client was entirely at your client's peril and in the
- G circumstances, I do not see how it can be said that you have defaulted in my credit facilities with your client and that I am indebted to your client in this regard'.

Second SSA/third agreement

- H [9] With this stalemate and still no payment from the plaintiff, the defendant initiated foreclosure proceedings on the said shares. An advertisement offering the sale of the said shares to the highest bidder was placed in The Star newspapers on 12 September 2002. This transaction went
- I through the solicitors of the various parties. HHB's solicitors were Messrs Nik Saghir & Ismail while the defendant's was Messrs Azim Tunku Farid & Wong. HHB made an offer vide its solicitor's letter dated 25 September 2002 to the defendant's solicitors. HHB's offer was accepted on 1 October 2002 and negotiations were then set in motion to settle the terms of the sale. Public

Consolidated Holdings Sdn Bhd, another subsidiary of Public Bank Bhd was finally nominated by HHB to buy the said shares from the defendant. A share sale agreement (second SSA/third agreement) was executed on 11 July 2003 between the defendant and Public Consolidated and this agreement was then completed with the payment of the purchase price to the defendant and the said shares registered to Public Consolidated. (The plaintiff referred to this as the 'third agreement' and the draft execution copy of this agreement as the 'draft third agreement'). The price agreed was RM42.67 per share. This was the same price as that agreed under the first SSA. The defendant credited the proceeds received from the second SSA into the plaintiff's overdraft facility. But, there was a shortfall of RM671,531.78 and so the defendant instructed its solicitors to issue a letter of demand dated 16 December 2003 for payment of the same. The plaintiff denied owing this money.

The deed of settlement

[10] The plaintiff who was unhappy with HHB's termination of the first SSA initiated an action against HHB for wrongful termination of the first SSA/second agreement vide High Court Civil Suit No D22-1654 of 2002 filed on 17 October 2002. In that action, the plaintiff sought general damages for breach of contract, and the sum of RM713,646.74 being the difference between RM12,801,000 and RM12,087,353.26. For that action, the plaintiff was represented by Mr Robert Lazar ('PW2') of Messrs Shearn Delamore. HHB resisted the action and filed a defence. It must be borne in mind that the plaintiff's course of action here took place just around the same time as the defendant was effecting the realisation of the collateral. Since HHB was simultaneously interested in the purchase of the said shares and desirous of settling the suit brought against it by the plaintiff; HHB instructed its solicitors to write to the plaintiff's solicitors on 25 February 2003 with a settlement proposal. There then followed exchanges between the parties, in the form of a phone call between the respective parties' solicitors, letters and even a meeting; culminating in the execution of the second SSA between HHB and the defendant; and the deed of settlement between HHB and the plaintiff. Pursuant to the terms of the deed of settlement, HHB then paid the plaintiff the agreed sum of RM600,000 and the plaintiff then withdrew the action against HHB on 14 October 2003.

THE CLAIM, COUNTERCLAIM, THIRD PARTY CLAIM

[11] When all the 'dust had settled' and the proceeds from the second SSA had been paid into the plaintiff's overdraft facility account, the plaintiff was said to be still owing the defendant a sum of RM671,531.78 as the proceeds from the sale were insufficient to meet the plaintiff's indebtedness with the defendant. The defendant then caused its solicitors to issue the plaintiff a

A demand for that sum. The plaintiff disputed the defendant's entitlement to that sum and decided to take the present pre-emptive action against the defendant.

[12] The plaintiff filed this originating summons where his primary relief is a 'declaration that the plaintiff was with effect from the 21 February 2002 not indebted to the defendant in respect of the account number 050-10-01507-3 previously used for the purposes of an overdraft facility granted to the plaintiff and that the borrowings in respect of the said account had been fully paid on the 21 February 2002'. The defendant in turn disputed the claim and counterclaimed for 'inter alia' the sum of RM671,531.78 as at 30 November 2003 together with interest of 3.5%pa above the defendant's base lending rate on daily rests and compounded monthly from 1 December 2003 until full and final settlement. In his defence dated 15 October 2004, the plaintiff maintained that he had executed the deed of settlement and the letter of consent on the underlying assumption that the defendant had agreed to a full discharge of his liability under the overdraft facility; that the defendant was estopped from making the claim; that the defendant intended, and the plaintiff, did in fact, rely or act on the defendant's express representation, conduct or promise that the plaintiff had been fully discharged from all liability. If there was a change to that underlying assumption, the defendant was under a duty to inform the plaintiff of that change. Having not informed the plaintiff of the change, the defendant cannot assert any right against the plaintiff in respect of the overdraft facility.

[13] On 22 March 2005, the plaintiff brought HHB in as a third party; that HHB indemnifies the plaintiff in the event the plaintiff is found liable to the defendant. This claim of indemnity is not grounded on a contract of indemnity. In effect, it is a stand-alone claim which relies substantially on the same events involving the same parties as the primary claim but which the plaintiff seeks to require determination only in the event he is found liable to the defendant's counterclaim. In this third party claim, the plaintiff alleged that HHB had made certain misrepresentations which had caused him to sign the deed of settlement. HHB's defences 'inter alia' are that there is no actionable claim against HHB; a denial of misrepresentation; and a failure to prove the claim on the applicable burden of proof.

H DECISION OF THE COURT

[14] The plaintiff's claim, the defendant's counterclaim and the third party claim are clearly dependent on the same factual matrix as elucidated above. I shall deal with each claim in the order instituted.

The plaintiff's claim

[15] The plaintiff's pre-emptive action against the defendant is grounded on

the basis that it was wrong for the defendant to have refunded the redemption sum. The determination of this will require the court to evaluate the material events as set out above; in particular, it would be necessary to go all the way back to the first SSA/second agreement.

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[16] Dato' Dominic Puthucheary, learned counsel for the plaintiff reasoned that by virtue of cl 3 of the first SSA, the sale and purchase of the said shares was conditional upon the receipt of approvals of the Securities Commission, Foreign Investment Committee and other regulatory approvals. These were the only conditions precedent. Time frames were worked into the terms of the first SSA for the fulfillment of these conditions precedent. Clause 4.1 provided that completion of the first SSA would take place 14 days after the unconditional date, that is, when all the conditions precedent had been fulfilled. It is the plaintiff's case that the refund of the redemption sum was only allowed when these and only these conditions precedent could not be fulfilled and the first SSA could not be completed. Refund under any other circumstances was not allowed because there was just no enabling provision. Certainly, not for a situation involving a notice sent by Cheng Poh, as was the case here.

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[17] It was further the plaintiff's case that the terms of the undertaking provided that the defendant's obligation to refund were premised on the non-registration of the said shares and nothing else. The plaintiff contended that by virtue of the parties being in a banker-customer relationship, there was in essence a fiduciary relationship where the defendant owes the plaintiff a duty to observe reasonable skill and care when dealing with the matter of refunding the redemption sum (see *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2006] 5 MLJ 1; [2006] 3 CLJ 1). From the deployment of the phrase 'not registered for any reason whatsoever' in the undertaking, it was contended that plainly and properly, there must be a presentation for registration of the transfer before it could be said that the said shares were not registered for any reason whatsoever. Since there was never any attempt at registration, the undertaking never operated or could not be invoked.

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[18] The plaintiff has also taken issue with the defendant's failure to abide by the terms of the redemption statement cum undertaking in not returning all the documents that the defendant undertook '... to deliver to you or your solicitors a duly executed Receipt & Reassignment/Discharge of Charge, Loan Agreement/Document of Title and Sale and Purchase Agreement/Charge Document as well as any other relevant documents relating thereto presently in our custody upon receipt of the redemption sum'. The plaintiff claimed this failure was a breach of the defendant's undertaking to him and by reason of this breach, it would be wrong to allow the defendant the opportunity to profit from its own wrong. At the same time, the plaintiff has nevertheless relied on the return of some of these documents under cover of letters dated 1 March

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- A 2002 and 11 March 2002. These letters bearing the respective title captions of 'Full Settlement of Credit Facility, Discharge of Charge' and 'Discharge of Charge, Full Settlement of Credit Facility' are said to be evidence of the full settlement of the facility and the plaintiffs discharge. The plaintiff also contended that once his account was credited, the defendant was not allowed to withdraw and return that sum to HHB without his consent, more so, when the refund was without basis.

- C [19] Mr John Wong Yok Hon, learned counsel for the defendant disagreed. He submitted that the plaintiff's interpretation on the effect of the undertaking was predicated on the presence of an impediment to the registration of the said shares. Unless and until there was such an impediment, the undertaking was not invoked or could not be invoked. Mr Wong contended that such interpretation was incorrect for several reasons. First, from the language itself; and secondly, by drawing an analogy with 'on demand guarantees'. In the first sense, the use of the words 'is not registered' meant that it was immaterial what caused the non-registration; whether it by reason of impediment, termination or mere reason that HHB decides not to present the transfer. In the second sense, as is the case in on demand guarantees, it was immaterial in an undertaking what caused the transfer not to be registered. In short, it was not for the defendant to inquire or examine HHB's reasons for calling on the undertaking. This was established in *Esso Petroleum Malaysia Inc v Kago Petroleum Sdn Bhd* [1995] 1 MLJ 149; [1995] 1 CLJ 283 and followed in *Merit Properties Sdn Bhd v Aktif Lifestyle Stores Sdn Bhd (formerly known as Yahohan Sdn Bhd) & Anor* [2007] 5 MLJ 28; [2007] 4 CLJ 128, that on demand guarantees are to be honoured irrespective of the dispute between the parties. Again, this was due to the recognition of the commercial intent and character of on demand guarantees.

- G [20] In my view, while it is true that commercial intent and the character of on demand guarantees warrants the recognition of the need for immediate responses to demands being met without question, the related case law has actually developed in that manner due to the exacting language found in those on demand clauses. The same may also be said for performance bonds where the language used similarly requires compliance or performance without hesitation. As for undertakings which are under examination here, the interpretation of undertakings is actually no different from how contracts are generally interpreted. The Federal Court had occasion to address this same issue in *Michael C Solle v United Malayan Banking Corporation* [1986] 1 MLJ 45 where the Federal Court held that 'the principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language used. They are presumed to have intended what they said. The common and universal principle is that an agreement ought to receive that construction which its

language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement'. This exercise of construction therefore calls for the examination of the undertaking as a whole and never piece meal having regard to the context, circumstances and purpose for which the undertaking was given. When that is done, then the true purport of the undertaking can be appreciated and the intention of the parties given effect to.

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[21] In determining that intention, it must be borne in mind that the parties to this undertaking are not the plaintiff and the defendant; but the defendant and HHB. It is their intention that is relevant and not, what the plaintiff, who is not a party to the undertaking, says or thinks the undertaking means. The evidence revealed that the letter of undertaking was actually required by HHB and the contents agreed between HHB and the defendant, the requisite parties and for justifiable reasons too given that a substantial part of the purchase price was being utilised towards the redemption sum even before the first SSA was completed. Even the plaintiff recognised this. In his evidence in chief, he alluded to the letter of undertaking 'over which I have no say, control or influence addressed to the third party to the effect that in the event the transfer of the shares to the third party is not registered for any reason whatsoever, the defendant bank will refund in full the redemption sum'.

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[22] From the terms of this undertaking and appreciating the full circumstances under which it was provided, I cannot agree that this undertaking is of like character and effect as on demand guarantees or performance bonds. Although irrevocable, the language used is not unequivocal such as that found in on demand guarantees or performance bonds. With respect, by language, it is not the exercise or of the sense suggested by the plaintiff as that is not how contracts are to be interpreted. In *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* p12 (MLJ), p15 (CLJ), the Supreme Court opined that '... if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders'. Similarly, it is evident from the circumstances and the content of the undertaking, that it was the intention of HHB and the defendant, that the defendant was required to see if the 'transfer of the Shares to you is not registered for any reason whatsoever'. In order to do that, the defendant has to exercise some examination of the call by HHB before performing or acting on HHB's call or demand for refund. The defendant however, is not required to inquire or examine into the rightness of that call, just whether the four corners of that call have been met. It is not expected to sit as arbiter. So long as HHB provided the defendant with a reason that the transfer of the shares is not registered, that is enough. To require the defendant

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- A to do that would be to take it outside the parties' intention as evinced from the terms of the undertaking. It would also defeat the commercial intent and character of the undertaking given that the undertaking is but a part of the larger exercise by a defaulting party seeking to redeem his loan.
- B [23] There was much argument from both the plaintiff and the defendant concerning the need for some attempt at registration and that it is only when registration is not successful, that the undertaking can be invoked. Insofar as the registration of shares are concerned, it was contended by the plaintiff that
- C the Supreme Court had opined in *Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors* [1990] 3 MLJ 361 that the court should not interfere with the proper exercise of discretion of the board of directors conferred by the articles of association to refuse registration for the well being of the company.
- D [24] With respect, limiting the construction and interpretation of the undertaking to the trigger event of the actual 'registration' of the said shares as opposed to the 'registration of the transfer' of the said shares would, in my opinion render the word 'transfer' in the undertaking, redundant, 'inoperative or surplus'. Such a construction must be avoided as all parts of the undertaking
- E must be given effect to without rendering any part inoperative or surplus — *City Investments Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 MLJ 285. The inclusion of the term 'transfer' was deliberate and must have been intended by the parties to carry the meaning explained by the contracting parties to the undertaking, namely the defendant and HHB. In any case, the
- F Supreme Court in *Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors* was there examining quite different circumstances from our present case. There, the respondents who were already the owners of certain shares which had been transferred to them wanted their names registered as owners of those shares. In exercise of their discretion under article 44(1) of the articles of
- G association of the company, the directors of the company refused. It was in this regard that the Supreme Court made those observations. Those circumstances are entirely different from the conditions presented here. The reading and construction of the undertaking must be of the entire undertaking and not merely of any choice terms or words, be it 'registration' or 'transfer' without any
- H regard to the factual matrix. Otherwise, the intention of HHB and the defendant in respect of the undertaking cannot be gathered and the 'pledge, promise or guarantee' ('undertaking' as defined in the *New Oxford English Dictionary*) which the parties have agreed to undertake (defined as 'to contract to or commit oneself to (something) or (to do something) as defined in *Collins English Dictionary*), cannot be given effect to.
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[25] The court's finding here is supported by the direct evidence led at trial. Mr Ong Ching Hui ('DW1'), section head of consumer non-hire purchase in credit recovery of the defendant testified that the redemption sum was not

received from HHB 'free of obligations'. The obligation attached to the letter of undertaking was that 'in the event the share is not registered in favour of HHB for any reason whatsoever, then the defendant has to refund the redemption sum'. DW1 also testified that the refund was made because of HHB's letter dated 22 March 2002 to the defendant. In that letter, HHB 'inter alia' informed the defendant that HHB had terminated the first SSA with the plaintiff because the plaintiff was in breach of a condition in the first SSA. HHB then demanded, and the defendant did, refund the redemption sum 'In view of the fact that the transfer of the sale shares are now incapable of being registered in our client's name'.

[26] There was also evidence from HHB. Unlike other senior officers, TPW1 who was the Senior General Manager, Treasury and Corporate Operations of Public Bank Bhd, and who personally handled the transactions involving the sale of the said shares on behalf of HHB, a wholly-owned subsidiary of Public Bank Bhd, came forward to testify. His evidence was from his own knowledge. He testified that when Cheng Poh's claim was not resolved by the plaintiff within the time period given, HHB terminated the first SSA. Thereafter, HHB's solicitors informed the defendant by letter dated 22 March 2002 of the termination 'due to the plaintiffs breach and as a result of the termination, the said shares would not be capable of registration in HHB's name'. In the same letter, the undertaking was invoked and the defendant was required to refund the sum paid.

[27] It is further observed that the plaintiff had agreed to HHB calling on the undertaking and this can be seen from cl 2.2 of the first SSA. Clause 2.2 provides that 'The Vendor hereby agrees that the Purchaser shall have the right to instruct EBB to refund the Deposit in accordance with the Undertaking if the completion does not take place in accordance with the terms of this Agreement provided that the Purchaser shall deliver the said Document to EBB in exchange thereof'. It was open to the plaintiff to initiate some action to prevent the refund of the redemption sum to HHB. In fact, the defendant had proposed that to the plaintiff but the plaintiff chose not to. It was entirely his prerogative. However, this indicates the plaintiff's own understanding or appreciation of the defendant's role in relation to the undertaking. The parties had clearly intended the defendant to refund the redemption sum without engaging in the merits of the demand. That issue was one more suitably addressed between the plaintiff and HHB. But, since those parties have resolved the matter with the plaintiff further withdrawing his suit against HHB, it would be inappropriate for this court to dwell into the validity of HHB's action in that regard. I am therefore unable to agree with the plaintiff's proposition that the undertaking be read to mean that there must be some attempt to register the said shares before the undertaking can be invoked.

- A [28] For all these reasons given, I am satisfied that the plaintiff's claim is without merit and must be dismissed.

The defendant's counterclaim

- B [29] As a consequence of my finding on the refund of the redemption, it is further my finding that with the first SSA terminated and the redemption sum validly refunded by the defendant; the overdraft facility account stood as unsettled. This can only be so since the first SSA was in the first place, although initiated by the plaintiff, it was specifically to settle the plaintiff's indebtedness under the facility arrangements with the defendant. With the account still outstanding, the second SSA entered by the defendant was therefore an exercise by the defendant in order to address the plaintiff's indebtedness. The defendant's crediting of the proceeds from the sale under the second SSA into the plaintiffs overdraft account is further evidence of that fact.

- D [30] As proof of the plaintiff's indebtedness and the sum owing, DW1 had testified that the defendant was entitled to charge default interest at the rate of 3.5%pa above the defendant's BLR in accordance with cl 6A.5.2 of the supplemental agreement and cl 6 of 'Other Terms and Conditions' in the letter of offer dated 21 August 2001 DW1 further testified that regular statements of accounts were sent to the plaintiff. These statements show that the amount claimed was outstanding. He further told the court that the plaintiff had never objected or disputed to these statements.

- E [31] Having considering and after weighing the evidence led on the amount outstanding and in view of the plaintiff's case, I find that the plaintiff's amount of indebtedness is not really in issue. The plaintiff has not, if at all, seriously challenged the evidence presented on this aspect of the defendant's claim. In any case, I am satisfied that the amount together with the interest as claimed by the defendant has been proved on a balance of probabilities.

The third party claim

- H [32] Following from my finding on the defendant's counterclaim, the plaintiff's indemnity claim against HHB is now relevant for consideration.

- I [33] The essence of the plaintiffs claim is that HHB must indemnify him because he had been induced by HHB to enter into the deed of settlement on HHB's representation that he was fully discharged from any obligations to the defendant. These are the representations — (i) in a telephone conversation on 12 March 2003 between their respective solicitors; and (ii) at recital G and cl 6.1(d) in the draft of the second SSA where it was stated that 'the defendant had agreed that one of the terms of the proposed second sale purchase of the

KLMFB Shares ('the Proposed second Sale1') would be a full discharge of any and all obligations of the plaintiff under the Overdraft Facility (if at all) ('the Representation'). On both occasions, the plaintiff, through his solicitor, PW2 was given the assurance by TPW2 that the plaintiff's full discharge was 'no longer a problem'.

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[34] The plaintiff further contended that this matter of the plaintiffs discharge was a fundamental term before there was any settlement between the plaintiff and HHB. Like the 'reasonable... fairly successful businessman' in the Federal Court decision in *Kheng Chwee Lian v Wong Tak Thong* [1983] 2 MLJ 320, the plaintiff claimed that the settlement was not one that he would have signed had it not been for the representations of HHB. In *Kheng Chwee Lian v Wong Tak Thong*, the Federal Court had recounted the learned trial judge's comments that '... I can't accept this as a deal which a reasonable man like the plaintiff, a fairly successful businessman would accept. Why should he when there was absolutely no rhyme or reason for him to do so?' The plaintiff claimed that these two positive assertions were made by HHB '... fraudulently and either well knowing that the Representation were false, untrue or recklessly not caring whether they were true or false'. The plaintiff further claimed to have acted upon the faith and truth of those representations by entering into the deed of settlement. The representations have since been discovered to be untrue in that the second SSA that was finally executed on 11 July 2003 did not contain the terms of the full discharge or at all (both the recital and cl 6.1(d) were not included in the second SSA that was signed). The plaintiff has further relied in the alternative, on ss 17, 18 and 19 of the Contracts Act 1950 and wants to be put in the position in which he would have been in had the representations made been true; that is that he has been discharged.

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[35] Mr Romesh Abraham, learned counsel for HHB raised three responses to the plaintiff's claim: that the indemnity was not actionable; that the elements for an allegation of fraud and fraudulent misrepresentation were wanting; and on the facts, the action was not maintainable because the claim has not been proved under the requisite burden.

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[36] Dealing first with the matter of plea. The relevant allegations of fraud and fraudulent misrepresentation can be found at paras 10 to 14. The basis for these allegations is clearly the two occasions already identified by the plaintiff and which does not bear repeating. On this matter of the plea, HHB's contention is that there is only a bare plea or bare allegation of fraud with no particulars afforded and the Court invited to infer from those bare pleas. This has been contended to be wrong. Fraud cannot be inferred – relying on *Min Hong Auto Supply Pte Ltd v Loh Chun Seng & Anor* [1993] 3 SLR 498, the third party cited Rubin JC who when addressing this same issue concluded with the following observations made by Lord Thesiger in *Davey v Garrett* (1877–78) 7

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- A Ch D 473 — ‘It is an elementary principle of pleadings that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the facts’. KC Vohrah J (as His Lordship then was) in *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193, 197 similarly opined that ‘... there is merely a general allegation of fraud and the pleadings stand mute as to the circumstances relied upon as constituting the alleged fraud: A general allegation of fraud is insufficient even to amount to an averment of fraud of which any Court ought to take notice...’ In my view, these decisions are in fact consistent with and once again have developed around the requirements on specific pleas under O 18 r 12 of the Rules of the High Court 1980. The plea of fraud is a specific plea which requires particularisation, principally to avoid the other party being caught by surprise, and also because these are very serious allegations which often have far-reaching consequences.

- D [37] However, from the plaintiff’s statement of claim against the third- party, particularly at those paragraphs identified by the third party, there is particularisation or details of the circumstances set out which the plaintiff say amounts to fraud and fraudulent misrepresentation. From a perspective of plea, I am of the view that there is compliance of O 18 r 12 and that there is adequate plea. If one were to observe the pleas in the two cases cited by the third party, it will be seen that the pleas there were indeed both general and bare. It was therefore no surprise that the pleas were then found wanting. Here, the two particular instances that are said to be the details of the fraud or fraudulent misrepresentation have been pleaded. Whether those circumstances amount to fraud or fraudulent misrepresentation is entirely a different matter and would be for this court to determine based on the evidence offered. The plaintiff bears the burden of proving the existence of fraud or fraudulent misrepresentation. In this regard, the third party has contended that the burden is one of beyond reasonable doubt as established in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* ; [2007] 2 MLJ 301. In that case, the Federal Court held that:

- G It is now settled law that the standard of proof required where there is an allegation of fraud in civil proceedings must be one of beyond reasonable doubt and not on a balance of probabilities (see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC)).

- H [38] On the other hand, the plaintiff has submitted that the burden of proof is one of the civil burden as determined in the Federal Court decision in *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45; [1997] 1 CLJ 497 (in this regard, see also *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241; [2001] 2 CLJ 133 which was not disturbed in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* or even the recent decision of the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1; [2010] 2 CLJ 269). The argument here being that because it is an allegation of a civil

fraud as opposed to a criminal fraud, as was the case in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd*, the decision in *Ang Hiok Seng v Yim Yut Kiu* should prevail.

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[39] In my view, the applicable burden of proof is the civil burden as found in *Ang Hiok Seng v Yim Yut Kiu*. In this decision, the Federal Court specifically recognized the existence of civil and criminal frauds in civil proceedings whereas the same was not discussed (presumably because it did not arise) in *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd*. Prior to this decision, it was thought that the Federal Court had settled this issue in the case of *Saminathan v Pappa* [1981] 1 MLJ 121 — that ‘As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt see the Privy Council case of *Narayanan v Official Assignee, Rangoon 1941 PC 93*’.

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[40] However, in *Ang Hiok Seng v Yim Yut Kiu* at p 517, after examining all the authorities cited including its earlier decision in *Saminathan v Pappa*, the Federal Court said:

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From the wide definition of ‘fraud’ under s 17 of the Contracts Act 1950, and as well as the leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud, or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on a balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot be based on suspicion or speculation merely...

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From all the authorities cited before this court, it seems clear that fraud can be civil or criminal in any civil proceedings. Hence the *Osborne’s Concise Law Dictionary*, (8th Ed) p 152 defines fraud as follows:

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The obtaining of a material advantage by unfair or wrongful means; it involves obliquity. It involves the making of a false representation knowingly, or without belief in its truth, or recklessly. If the fraud causes injury the deceived party may claim damages for the tort of deceit. A contract obtained by fraud is voidable at the option of the injured party...

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The definition of ‘fraud’ read in conjunction with the authorities, lead us to the conclusion that where the fraud alleged in civil proceedings is based on a criminal offence, then the criminal burden of proof beyond reasonable doubt must be applied. But where the fraud alleged is purely civil in nature, there is no reason why the civil burden should not apply.

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- A [41] In the facts of this case and after looking at the pleadings, in particular the two allegations against HHB, I am of the opinion that these are not allegations of criminal frauds or even of sharp practice. The 'fraud' or fraudulent misrepresentations complained of here pertain to civil wrongs to which the plaintiff therefore bears the burden of proving on a balance of probabilities. This would be regardless whether the allegation is one of fraudulent or negligent misrepresentation. That distinction is relevant for purposes of determining the remedies available. In *Sim Thong Realty Sdn Bhd v Teh Kim Dar @ Tee Kim* [2003] 3 MLJ 460; [2003] 4 AMR 460, the Court of Appeal opined that it was the nature of the misrepresentation that determined the remedies available. At p 469, Gopal Sri Ram JCA (as His Lordship then was) said:

- D Now, it is trite that the expression 'misrepresentation' is merely descriptive of a false pre-contractual statement that induces a contract or other transaction. But it does not reflect the state of mind of the representor at the relevant time. The state of mind of the representor at the time he made the representation to the representee varies according to the circumstances of each case. It may be fraudulent. It may be negligent. Or it may be entirely innocent, that is to say, the product of a mind that is free of deceit and inadvertence... It is the particular state of mind of the representor that determines the nature of the remedy available to the representee. So, if the misrepresentation is made fraudulently, then the representee is entitled to rescission and all damages directly flowing from the fraudulent inducement.

- F [42] At p 471 of the same judgment, His lordship went on to discuss the position of negligent misrepresentation: 'If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465. In such a case the representee must plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence'.

- G [43] Insofar as proving the allegations are concerned, these are my findings and decision.

- H [44] For this, it is necessary to remind ourselves how the deed of settlement came about — it all started with HHB who was interested in purchasing the said Shares as well as settling the suit brought by the plaintiff. With that in mind, HHB put its settlement proposal across to the plaintiff through its solicitors' letter dated 25 February 2003 (the plaintiff referred to this as the 'letter of 26 February 2003' because it was sent to him by Mr Robert Lazar (PW2), his solicitors vide letter of that date). The events and various exchanges between the parties that evolved from that proposal are extremely relevant as they form the basis of the plaintiff's cause of action against HHB. For these

reasons, these exchanges will be set out in detail. These are the critical terms of the settlement proposal as found in HHB's letter of 25 February 2003: A

Messrs Shearn Delamore & Co

Advocates & Solicitors

7th Floor Wisma Hamzah-Kwong Hing B

No. 1 Leboh Ampang

50100 Kuala Lumpur

Attn: Mr. Robert Lazar C

Dear Sirs,

Kuala Lumpur High Court

Civil Suit No: D7-22-1654-2002 D

Abdul Ghani bin Abdullah v HHB Holdings Berhad

- (1) We act on behalf of HHB Holdings, our client, to propose a settlement of the above suit.
 - (2) Our client proposes that in consideration of and subject to your client unconditionally withdrawing the above Suit without liberty to file afresh and your client agreeing to unconditionally waive all rights to make any claim of whatsoever nature against our client relating to the Suit or in relation to the termination by our client of the sale by your client of 300,000 ordinary shares of RM1.00 each in Public Mutual Berhad pursuant to the conditional Share Sale Agreement dated 21st February, 2002, our client will pay to your client a settlement sum of RM600.000. E
 - (3) The above settlement terms are subject to (i) our client having completed the acquisition of the 300,000 ordinary shares in Public Mutual Berhad ('the said Shares') from EON Bank Berhad and (ii) the execution of a settlement agreement ('Settlement Agreement') between our respective clients on terms to be agreed upon. The Settlement Agreement will be executed upon the completion of the acquisition of the said Shares from EON Bank Berhad referred to above. F
 - (4) The payment of the settlement sum of RM600.000 shall be made to yourselves to be held as Stakeholder upon the execution of the Settlement Agreement and you will be authorized to release the same upon your written confirmation to us of the withdrawal of the Suit by your client without the liberty to file afresh. G
 - (5) Kindly indicate whether your client is agreeable to the above settlement terms within ten (10) days from the date hereof. Should you require further clarification, please contact our Jonathan Law. H
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[45] The plaintiff confirmed these terms in his evidence-in-chief. Pausing here for a moment; it is pertinent to note that nowhere in HHB's proposal to

A settle was there included any mention of the plaintiff's discharge from the defendant. Instead, it was brought up for the first time by the plaintiff in his solicitor's letter of 3 March 2003 in response to HHB's proposal. In that letter, the plaintiff's solicitors told HHB's solicitors that in principle, the plaintiff was agreeable to the terms of the proposal. But, the plaintiff had his own terms —

B he expected the defendant to confirm to him that '... the funds that the defendant Bank receives pursuant to the intended Third Agreement for the purchase of the 300,000 by the third party from the defendant Bank in full and final settlement of my account with the defendant bank'. These are the salient contents of the plaintiff's letter sent by PW2:

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Our client notes that condition (a) as set out in paragraph 3 of your letter requires the completion of the acquisition of the 300,000 shares from EON Bank Berhad. Please confirm that EON Bank Berhad is agreeable to the sale of these shares to your client. We ask this because these shares were pledged to EON Bank Berhad. You are at liberty to now inform EON Bank Berhad of our client's response to the proposal.

D *In addition our client would expect EON Bank Berhad to confirm to our client that the funds they receive from your client pursuant to the sale and purchase are in full and final settlement of our client's account with EON Bank Berhad.* By reason of the same, our client would expect a mutual release and discharge of each and all obligations between our client and EON Bank Berhad to each other. Please inform EON Bank

E Berhad of these matters in view of their involvement in view of the proposed settlement between our respective settlement.

[46] On 12 March 2003 (Wednesday), PW2 wrote to the plaintiff enclosing his draft letter to the defendant's solicitors. In that same letter, Mr Lazar informed the plaintiff that 'Jonathan Law called me on Monday to say that EON Bank have confirmed sale and purchase with HHB Holdings Bhd, and one of the terms is a full discharge in your favour'. On that same date, PW2 also wrote to the defendant's solicitors seeking inter alia confirmation on behalf of

G their client that 'an arrangement has been entered into between HHB Holdings and EON Bank Bhd for the sale of the 300,000 shares in Public Mutual Bhd which had been pledged to your client by our client. We have been told that in consideration of this sale, and the receipt by your client of the purchase price that EON Bank Bhd will absolutely and completely discharge our client of all and any of his obligations and liability to EON Bank Bhd. We have been asked

H to inform you that your client has no objections to the sale and to the terms mentioned above'. There was no reply from the defendant's solicitors.

[47] On 22 April 2003, HHB's solicitors sent a draft deed of settlement to the plaintiffs solicitors for their comments and perusal. Three days later, on 25 April 2003, HHB's solicitors sent another letter, this time enclosing the draft share sale agreement for the plaintiff's perusal. In that letter, the plaintiff was asked to pay particular attention to the letter of consent which was attached as an appendix. This letter of consent meant for 'ABDUL GHANI BIN

ABDULLAH'S adoption' is the plaintiff's consent to the second SSA. The relevant parts of the consent as prepared by HHB is as follows: A

My consent is given to you on the condition that the Purchase Consideration and the Related Reimbursements received by you pursuant to the Share Sale Agreement is paid into my account for the Facility [Account No.] ('My Account') on the Completion Date (as defined in the Share Sale Agreement) *and be utilized towards full settlement of mv obligations arising from, and/or under the Facility and the Facility Agreement.* B

I acknowledge that I have received a copy of the unsigned Share Sale Agreement in the form substantially attached herewith and I am aware of and approve the terms and conditions contained therein. C

[48] The plaintiff personally perused the draft share sale agreement and returned the draft together with a letter of consent to his solicitors vide memo dated 26 April 2003. In that memo, he informed PW2 that he had 'removed the word 'substantially' in the last para of the consent'. By the time the letter of consent was returned to HHB, the plaintiff and his solicitors had had a rethink of its contents. The letter of consent that was finally returned to HHB by the plaintiff's solicitors on 29 April 2003 read as follows: D E

My consent is given to you on the condition that the Purchase Consideration and the Related Reimbursements received by you pursuant to the Share Sale Agreement is paid into my account for the Facility [Account No.] *and be utilized towards full settlement of mv obligations arising from and/or under the Facility and the Facility Agreement and that you will thereupon have no further or other claims against me in relation to the Facility and any connected accounts.* F

[49] Upon receipt of this, HHB's solicitors forwarded the plaintiff's letter to the defendant's solicitors on 30 April 2003 with a request that they 'Please confirm that your client is agreeable to the consent letter and that your client will give a written confirmation to AG that 'it has no claims whatsoever against AG arising out of any banking facilities granted by EON Bank Berhad to AG' for the completion of the Deed of Settlement' ('AG' refers to the plaintiff). G H

[50] The defendant's solicitors responded to HHB's solicitors vide letter dated 8 May 2003 which materially stated:

We have our client's instructions to amend the AG's consent letter in the form enclosed herewith for your further action. Please note that our client is not aware of any deed of settlement mentioned in your letter and as such our client is not agreeable to give the written confirmation as you requested. However, as the monies received under the Agreement will only be credited to AG's account to pay off the debt owed under the facility granted to AG after the Completion Date (as defined in the Agreement), I

A our client will agree to giving a written confirmation to AG in such terms similar to that contained in the AG's consent letter".

B [51] The defendant's amendment to the letter of consent was an insertion of a provision to cover for the event of a non-completion of the second SSA. In such an event, the defendant wanted a refund of the purchase consideration and the plaintiffs liability to the defendant to be reinstated immediately. This is what the defendant wanted:

C My consent is given to you on the condition that the Purchase Consideration and the Related Reimbursements received by you pursuant to the Share Sale Agreement is paid into my account for the Facility [Account No.] ('My Account') on the Completion Date (as defined in the Share Sale Agreement) *and be utilized towards full settlement of my obligations arising from and/or under the Facility and the Facility Agreement and that you will thereupon have no further or other claims against me in relation to the Facility and My Account PROVIDED ALWAYS that in the event the sale of the Shares by you to Public Consolidated Holdings Sdn Bhd is struck down or avoided for any reason whatsoever, resulting in you being liable to refund the Purchase Consideration and/or the Related Reimbursements to Public Consolidated Holdings Sdn Bhd, my liability under or pursuant to the Facility in relation to My Account shall be reinstated immediately upon the refund of the Purchase Consideration and/or the Related Reimbursements being made to Public Consolidated Holdings Sdn Bhd.*

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F [52] These comments were conveyed by HHB's solicitors to the plaintiffs solicitors on 12 May 2003. A meeting then ensued on 16 June 2003 in the PW2's office between HHB and the plaintiff. HHB was represented by Mr Leong Kwok Nyem ('TPW1'), its chief operating officer and Mr Jonathan Law ('TPW2'), its solicitor. The plaintiff attended with PW2. The defendant did not attend. The attendees at the meeting have testified to different appreciations and understandings of the purpose and outcome of that meeting.

G However, it is common evidence that the various drafts as mentioned earlier were perused.

H [53] On 17 June 2003, the day following the meeting, the plaintiff's solicitors forwarded to him a draft letter to the defendant for his 'consideration and comments'. This draft was actually the draft letter of consent which PW2 proposed to send to the defendant. This time the position of the consequences of a non-completion of the sale was even more detailed:

I My consent is given to you on the condition that the Purchase Consideration and the Related Reimbursements received by you pursuant to the Share Sale Agreement is paid into my account for the Facility [Account No.] ('My Account') on the Completion Date (as defined in the Share Sale Agreement) and be utilized towards full settlement of my obligations arising from and/or under the Facility and the Facility Agreement and that you will thereupon have no further or other claims against me in relation to the Facility and My Account ('Full Release'). In the event

the sale of the shares by you to Public Mutual Berhad is after completion struck down or avoided by a judgment of a court of competent jurisdiction resulting in a repayment by you of the purchase price, then both the 'Consent' as defined above and the 'Full Release' as defined will not be operative and this letter will cease to have any effect whatsoever, and we are at liberty to revert to the position as if the 'Proposed Sale' had not been undertaken at all.

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[54] The plaintiff perused PW2's draft and gave his comments on 18 June 2003, the essence of which is a non-agreement with the defendant's draft or even his solicitor's draft. These were his comments:

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- (1) It is really an issue between HHB Holdings and EON Bank to resolve the transfer of the shares
- (2) In the event the transfer is met with problems (not by SC) if given by Steven Soh, they cannot transfer the problem to me
- (3) My position has always been the same. EON have received the redemption sum and they went ahead with the release to HHB and now EON Bank is stuck, why should I acknowledge 'my account' or even to suggest I still owe monies to EON Bank

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I feel that HHB Holdings should take some risk on this.

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[55] Subsequently, by an email dated 27 June 2003 to the defendant's solicitors, HHB's solicitors confirmed that the plaintiff had indicated that he was 'not going to give his consent letter in respect of the sale of the Shares by EON Bank to Public Consolidated'. In the same email, HHB's solicitors informed that HHB 'still wishes to proceed with the purchase of the Shares by Public Consolidated' and sought an indication as to when the defendant 'would like to execute the spa'. As alluded to earlier, there then followed the execution of both the second SSA and the deed of settlement on 11 July 2003. HHB paid the plaintiff the agreed sum of RM600,000 whereupon he withdrew his action against HHB on 14 October 2003. A few months later, the defendant sued for the balance outstanding.

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[56] I must say at the outset that it is unfortunate that the claim has come to this. From the evidence proffered, especially in the exchange of letters over the wording of the letter of consent acceptable to both the plaintiff and the defendant, it can be seen that the defendant was prepared to consider and accept the payment of the consideration under the second SSA as full settlement of the plaintiff's obligations under the facility agreement upon completion of the second SSA. Ultimately, the second SSA was completed without incident unlike the first SSA. However, from and because of its experience under the first SSA where arguments ensued over the rights, obligations and positions of the parties in the event of a termination or non-completion of the first SSA (as discussed earlier in relation to the plaintiff's

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- A claim), it is easy to appreciate why the defendant required an amendment to the letter of consent incorporating an acknowledgment by the plaintiff of the defendant's interpretation in such an event. It is also easy to appreciate why the plaintiff refused to provide that acknowledgment or to agree to such a term. He was, after all, maintaining that the defendant was wrong in refunding the redemption sum to HHB. He claimed that with effect from 21 December 2002, he was no longer indebted to the defendant and that the overdraft facility and the borrowings had been fully paid on 21 December 2002.
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- C [57] Be that as it may, these exchanges that I have set out in detail are extremely revealing in many ways. First of all, it reveals that the parties were very much in charge of their own respective 'destinies' and this therefore belies the plaintiff's allegation of misrepresentation. In fact, it is difficult to accept that there was even any representation of the nature alleged by the plaintiff.
- D After all, a representation in law is a 'statement of fact by one party to the contract (the representor) to the other (the representee) which while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation that it is untrue. The representor's state of mind and degree of
- E carefulness are not relevant to classifying a representation as a misrepresentation but only of determining the type of misrepresentation, if any' (*Cheshire, Fifoot and Furmstone's Law of Contract, Singapore and Malaysian Edition*, p 406).
- F [58] From the testimonies of the plaintiff himself, PW2, TPW2 and TPW1, and from the trail of correspondence exchanged between the parties, I am further satisfied that all the parties were still in negotiations as far as the terms of the deed of settlement and the second SSA are concerned. For otherwise, why else would there be proposal, comment, response, counter-proposal and
- G the like. In *Wishing Star Ltd v Jurong Town Corporation No 2* [2005] 1 SLR 339, a case which concerned a major and massive construction project where the documents were understandably voluminous and the parties were pre-occupied with the details and co-ordination of suppliers, materials, subcontractors, professional consultants and so on, Choo Han Teck J was of
- H the view that 'It will require very clear evidence that a party would not have entered into the contract if he had known that one or more representation made to him was not true for the court to find misrepresentation in such cases'.
- I [59] Similarly, in the facts of this case, in the plaintiff's quest of procuring the defendant's consent to the exacting language proposed by him in the letter of consent, it would require 'very clear evidence' before misrepresentation may be said to have been proved. The court was shown and heard evidence of various drafts, in fact multiple drafts perused; commented, amended and exchanged between the parties. I have taken the liberty of highlighting the various

amendments made by the plaintiff and the defendant. It is patently obvious from this that the amendments made were extensive and not in the least trivial. Rather, they were material as they impacted on the consequences of non-completion of the second SSA. With such protracted negotiations, the court cannot say that there were any representations or misrepresentations which had induced the plaintiff into entering the settlement agreement. It may have been fundamental to the plaintiff that he was discharged from his obligations with the defendant and the defendant may well have been prepared to give him that discharge; but it was upon its terms. The evidence reveals that the parties, in particular the plaintiff, did not agree with the defendant's comments or amendments to the drafts circulated. Since the plaintiff had not agreed to the defendant's counter-proposal, the terms which were fundamental to the plaintiff remained unsettled and quite clearly, not agreed to by the defendant. There was finally, no settled draft save for the agreements signed.

[60] There is also the matter of whether HHB was in the position to make the representations that form the basis of the plaintiff's third party claim. While PW2 and TPW2 may have conveyed their respective clients' responses to the various proposals and counter proposals, and this extends to conveying the position of the defendant in respect of the discharge or full settlement of the facility with HHB's payment of the consideration, PW2 was fully aware that the consent or agreement to discharge must come from the defendant. I agree with Mr Romesh Abraham's submissions in this respect. In order to found an action on misrepresentation, that misrepresentation must have been made either by the other contracting party; or by an agent acting within the scope of his authority. It is quite evident that neither HHB nor its solicitors were in the position to make any representations for the defendant as neither was cloaked with authority or agency responsibilities. In *Min Hong Auto Supply Pte Ltd v Loh Chun Seng & Anor*, Rubin JC also had occasion to consider the issue of agency and his lordship cited the following from *Halsbury's Laws of England* (4th Ed) para 19:

The relation of agency is created by the express or implied agreement of principal and agent, or by ratification by the principal of the agent's acts done on his behalf. Express agency is created where the principal, or some person authorized by him, expressly appoints the agent, whether by deed, by writing under hand, or orally. Implied agency arises from the conduct or situation of the parties, or by operation of law, for example from necessity."

[61] From the evidence led, I am satisfied that TPW2 was not the agent of the defendant, whether expressly or by inference. There was certainly no ratification by the defendant of any of TPW2's actions. There is in fact no causal link or relationship between the defendant and HHB for even the exercise of ratification to operate. This position in law and on the facts must have been appreciated by PW2. Indeed, it must have been for this reason that

- A PW2 sought confirmation and documentation directly from the defendant's solicitors on this through his letter of 12 March 2003 stating that 'an arrangement has been entered into between HHB Holdings and EON Bank Bhd for the sale of the 300,000 shares in Public Mutual Berhad which had been pledged to your client by our client. We have been told that in consideration of
- B this sale, and the receipt by your client of the purchase price that EON Bank Bhd will absolutely and completely discharge our client of all and any of his obligations and liability to EON Bank Bhd. We have been asked to inform you that our client has no objections to the sale and to the terms mentioned above'.
- C When there was no reply, there was no follow-up by the plaintiff, even after the second SSA was completed but before the execution of the deed of settlement. It was open to the plaintiff to verify the position of its facility with the defendant before withdrawing the suit against HHB and accepting the payment of RM600,000. He did not do so and it is somewhat late in the day for
- D him to complain. There is also the meeting of 16 June 2003. This meeting clearly discussed the drafts exchanged between the parties and clearly did not culminate in agreement on the appropriate wording of the consent clause. The actions of the parties after that meeting indicate that the parties were prepared to press ahead, regardless of the absence of agreement on the matter of the plaintiff's discharge.
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- [62] The abovementioned trail of correspondence exchanged between the parties illustrates their mutual lack of trust and confidence as well as a mutual lack of willingness to compromise. These elements are vital for attaining consensus ad idem. Without this meeting of minds on the contents of the letter of consent, the various proposals remain proposals or drafts and not, agreement. HHB and the defendant may well have been aware of the plaintiff's predicament, but that does not mean that either of those parties had agreed to the plaintiff's terms nor is there evidence to suggest that.
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- G [63] These observations and findings apply equally to the second SSA. In my view, the position of this agreement cannot be divorced from that of the letter of consent as the letter was meant to be an appendix to that SSA. Surely the plaintiff was well-aware that the non-settlement of the letter of consent would obviously impact on the second SSA and that amendments accordingly had to be made to the relevant clauses or provisions in the second SSA before it was finally signed.
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- I [64] Further, any representation purportedly made by HHB must have been relied on by the plaintiff before it is actionable and termed as a misrepresentation. From the facts adduced, it is obvious that being legally and ably represented, the plaintiff never accepted any matter that was brought to his attention without proper inquiry. On the contrary, the evidence shows his solicitor, PW2 as well as the plaintiff himself taking every available step to

verify everything that was told to them. The plaintiff was often cautious and particular in how he wanted the contents of any document to be worded or framed. Yet, where it was most crucial, the evidence is wanting in that when there was no response to their queries, the plaintiff did nothing. It would be reasonable to expect the plaintiff or his solicitors to have written to the defendant or its solicitors, perhaps giving the defendant an ultimatum that unless the defendant responded, it would have been taken as having consented to the discharge or full settlement or words to that effect. He did not. The court cannot now read behind or into the words found in the agreements an intention which is not supported by the evidence adduced. From the plaintiffs own conduct, I am satisfied that he had not relied on any representation by HHB when entering into the deed of settlement. This reliance is vital for any misrepresentation to be actionable as there must be an inducement by HHB to the plaintiffs detriment and that there has been an alteration of the plaintiffs position — *Sim Thong Realty Sdn Bhd v Teh Kim Dar, Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and Others* [2007] 1 SLR 196.

[65] My findings are further fortified by the plaintiffs note of 18 June 2003 to his own solicitor. At para 3, the plaintiff stated that his 'position has always been the same. EON have received the redemption sum and they went ahead with the release to HHB and now EON Bank is stuck, why should I acknowledge 'my account' or even to suggest I still owe monies to EON Bank. I feel that HHB Holdings should take some risk on this'. This indicates the absence of any reliance by the plaintiff on any representation by HHB. In the decision of *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and Others*, 213, the Singapore High Court quoting *Spencer Bower, Turner & Handley, on Actionable Misrepresentation* (Butterworths, (4th Ed), 2000) on actual inducement said that the burden of proving misrepresentation would not have been discharged if it was shown that the representee had in fact 'relied solely on something other than the misrepresentation, his own skill or judgment, his general knowledge of business, faith in the venture, special enquiries, or knowledge of the truth'. To me, this note is in fact cogent evidence that the plaintiff had chosen to rely on his own interpretation of the state of affairs between him and the defendant regardless of what others may say; and more importantly, regardless who may have said so. Indeed, being the 'reasonable... fairly successful businessman' described in the Federal Court's decision in *Kheng Chwee Lian v Wong Tak Thong*, the plaintiff has displayed conduct quite independent of any representation from anyone, including from his own counsel. He was both clear and single-minded. This is illustrated once more in his last response to PW2's proposal on the letter of consent where despite PW2's extensive amends to that letter, it merely elicited the response found in the plaintiffs note of 18 June 2003.

A [66] Given the above findings and reasons as set out above, I am not satisfied that the plaintiff has proved its claim on a balance of probabilities. The evidence including the plaintiff's own actions negate against the claim of misrepresentation by the third party and for which he seeks indemnity. Accordingly, I hereby dismiss the plaintiff's third party claim.

B [67] I had earlier invited all counsel to make their submissions on the appropriate quantum for costs. Having regard to inter alia the length of trial, the number of witnesses called, the complexities and number of issues raised for determination, I further order the plaintiff to pay the defendant and the third party costs of RM50,000 each.

C *Claims against defendant and third party dismissed with costs and counterclaim allowed.*

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Reported by Ashok Kumar

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